APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1968

Case No. 67-74

LEO HENZEL, *Appellant,*

v.

THE STATE OF FLORIDA, *Appellee.*

Opinion filed June 18, 1968.

An Appeal from the Criminal Court of Record for Dade County, Jack M. Turner, Judge.

Fink & Syna, for appellant.

Earl Faircloth, Attorney General and Harold Mendelow, Assistant Attorney General, for appellee.

Before HENDRY and SWANN, JJ., and NATHAN, RAYMOND G., Associate Judge.

HENDRY, Judge.

Appellant, defendant below, was charged with the offense of grand larceny by obtaining money by color or aid of fraudulent or false representations or pretenses in violation of § 811.021, Fla. Stat., F.S.A. Having entered a plea of not guilty and waived trial by jury, the defendant was tried by the court, adjudicated guilty and sentenced to a term of five years in the state penitentiary. The basis of defendant's primary point on appeal is that he was denied the right to be present at his trial in contravention of the provisions of § 914.01, Fla. Stat., F.S.A.

The trial of this cause was conducted in four separate hearings, commencing on July 6, 1966. The defendant was

present in the courtroom at all times during the first hearing. On July 11, 1966, the date of the second hearing, the defendant was conspicuously absent at the start of proceedings. When questioned by the court regarding the defendant's whereabouts, counsel for the defense informed the court that the defendant was in New York and was unable to obtain transportation to Miami because of a continuing strike by airline employees. However, defense counsel specifically waived defendant's presence, and the trial proceeded. The testimony of two witnesses for the prosecution was heard in the defendant's absence. On November 4, 1966, the date of the next succeeding hearing, the defendant was again present in the courtroom during the entire proceedings, and in fact, never again was he absent during the hearing of his case.

At the beginning of the proceedings on November 4, a list of witnesses who had previously given testimony in the case was read aloud by the clerk. Included on this list were the names of the two witnesses who had testified during the defendant's absence. The defendant raised no objection at that time or at any time thereafter until prosecution of the instant appeal. Defendant now contends that his right to confront his accusers has been abridged.

We recognize, of course, that a defendant has the right to be present at all proceedings before the court, whether with or without a jury, whereby prosecution for the commission of a felony is carried on. Section 914.01(4), Fla. Stat., supra; *Cole* v. *State,* Fla. App. 1967, 199 So. 2d 480. Nevertheless, it is well settled that, in non-capital cases, this right may be waived by the defendant, and voluntary absence has been held to constitute such waiver. *Mulvey* v. *State,* Fla. 1949, 41 So. 2d 156. Likewise, a defendant's subsequent acquiescence in matters conducted during his absence by his attorney has been construed as such a waiver. *Cole* v. *State,* supra.

Under the facts of the instant case, the defendant voluntarily removed himself from the jurisdictional limits

of the court a scant three days prior to the continuation of his trial, as there had been a hearing scheduled for July 10, which hearing was postponed. His inability to return does not alter the fact that he left voluntarily. Furthermore, the defendant was presented every opportunity to object, but he failed to do so. The first occurrence upon resumption of his trial on November 4, was the reading in open court of a list of witnesses who had testified prior to that point in the proceedings. We conclude, therefore, that defendant's right to be present at his trial for commission of a felony has not been abridged.

No reversible error having been shown, the judgment and sentence appealed are affirmed.

Affirmed.

APPENDIX B

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "nor shall any State deprive any person of life, liberty or property, without due process of law."

Fla. Stat. Ann. § 811.021 provides in pertinent part:

> "(1) A person who, with intent to deprive or defraud the true owner of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person:
>
> "(a) Takes from the possession of the true owner, or of any other person; or obtains from such person

possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing;

. . . .

* * * * * *

". . . steals such property, and is guilty of larceny.

"(2) If the property stolen is of the value of one hundred dollars or more, the offender shall be deemed guilty of grand larceny, and upon conviction thereof shall be punished by imprisonment in the state penitentiary not exceeding 5 years, or in the county jail not exceeding 12 months, or by fine not exceeding $1,000.00."

Fla. Stat. Ann. § 914.01 provides in pertinent part:

"In all prosecutions for a felony the defendant shall be present:

(1) At arraignment;

(2) When a plea is made;

(3) At the calling, examination, challenging, impaneling and swearing of the jury;

(4) At all proceedings before the court when the jury is present;

(5) When evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury;

(6) At a view by the jury;

(7) At the rendition of the verdict;

(8) Persons prosecuted for misdemeanors may, at their own request, by leave of court, be tried in their absence from the court.

Provided, however, that upon the beginning of the trial of a defendant upon any charge contained in any

indictment or information and the defendant being present thereat, if said defendant shall thereafter, during the progress of said trial, or before the verdict of the jury shall have been returned into court, voluntarily, without leave of court first had and obtained, absent himself from the presence of the court, the trial of said cause or the return of the verdict of the jury in said case shall not thereby be postponed or delayed, but said trial, the submission of said case to the jury for verdict, and the return of the verdict thereon shall proceed in all respects as though the defendant were present in court at all times."

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

No. 67-74

LEO HENZEL, *Appellant,*

v.

THE STATE OF FLORIDA, *Appellee.*

Affidavit

STATE OF FLORIDA }
COUNTY OF DADE } ss:

PERSONALLY APPEARED before me, the undersigned authority, LEO HENZEL, who after first being duly sworn, deposes and says the following:

1. That he is the Defendant-Appellant in the above styled cause of action.

2. That he has been advised that a portion of the trial, the verdict of which is being appealed herein, proceeded

while he was absent, and that such proceeding took place on July 11, 1966, during which your affiant was in New York City.

3. That the absence of the affiant from said trial proceedings were involuntary and were for reasons beyond his control, in that on said date there occurred an airline strike, thereby making it impossible for your affiant to travel from New York to Miami in order to appear at said trial on said date; that your affiant was not advised by anyone that trial of said cause would be held on July 11, 1966; that affiant had been assured by his attorney that no part of the trial would be conducted until after said airline strike had been concluded.

4. That your affiant has been advised that his attorney waived the presence of your affiant at said trial and on said date; at no time did your affiant authorize his attorney to waive his presence at said trial; the waiver of the presence of your affiant was made by his attorney without his knowledge, consent, or acquiescence, and your affiant did not at any time subsequently acquiesce to such waiver.

5. Your affiant was not shown a copy of the testimony taken in his absence when he returned to the trial.

6. Your affiant was at no time asked by the Court or by his attorney to relinquish or waive his right to be present during all the proceedings.

7. The first time I was advised trial was held on July 11, 1966, in my absence, was on December 9, 1966, when the Court adjudged me guilty; I was surprised the trial was ended as I had advised my attorney I had another witness, Mr. Sam Goldman, from New York; I assumed there would be time for Mr. Goldman to come from New York since time would be taken for testimony of Mr. Whidden and Mr. Sambataro; I questioned my attorney when said two witnesses would testify and I was advised they had already testified, in my absence; I did not want such testimony in

my absence as I had in my possession documents necessary for cross-examination of said two witnesses; I am a layman and not an attorney; I did not know how to object to the Court of testimony in my absence; I did voice my objection to my attorney, who did request the Court after the end of the trial to permit Mr. Goldman to testify, and the Court refused.

LEO HENZEL

Sworn to and Subscribed before me this 30th day of September, 1967.

My Commission Expires:

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Notary Public, State of Florida